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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN
and
HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER, POPE & TALBOT, INC.

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ARGUMENT.

This reply brief is directed toward answering certain of the arguments advanced by the respondent Hawn which are not covered in petitioner's main brief. Numbers within parentheses refer to pages in Hawn's brief.

1.

The major premise of Hawn's argument appears unobtrusively and unsupported by authority. Yet if this premise is unsound, his whole argument based thereon collapses.

Hawn says (p. 13) that the grant of judicial power of the United States to "all cases of admiralty and maritime jurisdiction" under Article 3, § 2 of the Constitution "im-

plicitly establishes the dominance of the maritime law over state law." As Hawn's subsequent argument discloses, "maritime law" is taken to mean the rules of decision created by the judges of the admiralty courts.

If Hawn's basic contention is sound, then it would likewise mean that the grant of jurisdiction in diversity cases nullifies Erie R. Co. v. Tompkins, 304 U. S. 64. Furthermore, Hawn loses sight of the fact that the Constitutional grant of jurisdiction merely clothes the admiralty courts with the power to hear and determine cases in which their jurisdiction has been invoked. The Constitution says nothing as to the substantive rules to be applied. It left to Congress the function of making the laws "necessary and proper" for carrying into execution the power to hear and determine. Congress, in turn, contented itself with simply specifying which of the federal courts should exercise the power of the United States to hear and determine. Congress likewise prescribed no substantive rules.

Clearly the mere grant of jurisdiction to the admiralty courts carries with it no implications or intimations of supremacy or dominance, for the power of the state courts, and of the federal diversity courts to hear and determine an action such as the present one is likewise unchallenged; indeed, it is expressly recognized by Section 9 of the Judiciary Act of 1789. If grant of jurisdiction is the test, as Hawn suggests, his argument under consideration is unsound unless he is prepared to deny the jurisdiction of the court which he here invoked.

Basically, what Hawn is contending is that he has a right to have his suit determined according to the rules of decision which would have applied if he had chosen to invoke the jurisdiction of the admiralty court. In his view, the mere existence of concurrent jurisdiction in some other court is sufficient to impose its substantive law upon the tribunal which he selected and preferred. This argument is obviously untenable.

II.

In support of the asserted dominance of the "maritime law", Hawn points to the validity of state death statutes as applied to tort on navigable waters (pp. 14-17). Recognizing as he must that such statutes are applied *even in the admiralty courts*, he nevertheless draws a conclusion that does not follow. He says that the recognition of state death statutes in admiralty proves that "it is only where the maritime law does not afford relief that the states are free to deal with the subject" (p. 17).

That this conclusion is invalid is demonstrated by *Just v. Chambers*, 312 U. S. 383, wherein it was held that the principle established by the cases involving state death statutes is

> ". . . that a state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations' . . ." (at 312 U. S. 389)

Just v. Chambers rejected the very argument advanced here by Hawn—that the application of a state death statute is permissible only because it fills a "void" in the maritime law. It held that the admiralty court would recognize the survival of a state death action as against the tortfeasor's estate even though the maritime law would have refused to do so. The recognition was held to be neither violative of nor repugnant to the characteristic or essential features of the admiralty jurisdiction.

It must be remembered that *Just v. Chambers* was one of the cases marking the decline of the doctrine announced in *Southern Pacific Co. v. Jensen*, 244 U. S. 205. In this

light, the words of Mr. Justice Holmes, in his original dissent from the *Jensen* doctrine, are peculiarly appropriate:

> "No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced, it is because the state had constitutional power to pass the law. . . ."

Contrast this with Hawn's present assertion (pp. 16-17) that the recognition in admiralty of state death statutes is "*an expression of judicial policy*, that it is desirable to enforce, in admiralty, those species of 'maritime-but-local' state-created rights which do not come into conflict with the maritime law . . ." (Emphasis supplied.) Hawn's correlative observation (p. 17) also demonstrates the fallacy of his own position: "The course thus pursued is one of choice and not one of compulsion, for there is no constitutional or legislative mandate imposing upon courts of admiralty the duty to enforce such rights."

If this is so, then where is the "constitutional or legislative mandate" imposing upon the common law courts the obligation of enforcing the substantive law created by the admiralty courts? Hawn merely assumes that such exists.

Bearing in mind that Hawn's thesis is the "dominance" of the admiralty law over state law, the treatment accorded state death statutes refutes rather than supports his argument. If the admiralty rules are "dominant", they must necessarily prevail over state law to the contrary. Yet in the case of wrongful death, the state statutes permit recovery, whereas the admiralty law most certainly does not. The two bodies of law were diametrically opposed, and the state law prevailed—not by grace of the admiralty judges, but because the state had the power to determine the incidents of the act done upon navigable waters within its jurisdiction.

III.

Hawn cites language from *Workman v. New York*, 179 U. S. 552, in support of his proposition of the "dominance" of the admiralty law irrespective of the forum (p. 17). As the rest of the sentence which Hawn does not quote reveals, the Court was there speaking only of the power of the *admiralty courts* to apply their own rules of decision in cases where their jurisdiction is invoked.

IV.

Hawn cites a number of seamen's cases for the proposition that the federal diversity court must enforce rights arising out of acts upon navigable waters under "substantive admiralty principles" (pp. 20, 21-25). In particular, he underscores the statement in *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372 (p. 25) to the effect that a seaman bringing suit in a common-law court for personal injuries could recover, even if guilty of contributory negligence. This reference is decidedly inapposite when considered out of context. The remainder of the quotation which Hawn omits makes it clear that the "recovery" under discussion was recovery of maintenance and cure and wages to the end of the voyage, as to which the seaman's entitlement has never been dependent upon his freedom from contributory negligence.

Apropos of the *Chelentis* citation, it is significant to note that the court recognized that the "contract of a seaman . . . . has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola*, 189 U. S. 158 . . . . the contract must be the same in every court, maritime or common law" (pp. 24-25). It is in this light that cases such as *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (p. 21), must be appraised. The *Garrett* case involved only a claim under the Jones Act and, as the *Chelentis* case points out, a claim for maintenance and cure arising from the seaman's contract. Petitioner need not here quarrel with the proposition that a contract

must be "the same" in every court, but we are not here dealing, as in seamen's cases, with rights allegedly arising under a contract.

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, cited by Hawn (p. 23) does not support his present position that the effect of contributory negligence must be determined under the admiralty law. First of all, the *Robins* case is contrary to *Caldarola v. Eckert*, 332 U. S. 155. Beyond that, the state court in the *Robins* case had unequivocally charged that contributory negligence barred recovery (at 266 U. S. 455-456). While this court disapproved another portion of the charge referred to by Hawn, it said nothing as to the portion of the charge dealing with contributory negligence.

V.

Hawn devotes seventeen pages (pp. 46-62) to an attempt to demonstrate that the rule of loss distribution announced below is in fact the established rule in the admiralty courts. Yet he does not and cannot cite a single case which so holds. The best he can do is indulge in generalities as to what the name of the rule is. He cannot demonstrate what the rule itself is, or how it works.

All of the authorities cited by Hawn which are of any moment are discussed adequately in petitioner's main brief. They do not establish any definitive rule under the facts of this case. Indeed, the best that Hawn can gather from them is an expression of "basic philosophy" (p. 62). It is not oversimplification to point out that this case presents, in the final analysis, a problem in mathematics, not a problem in philosophy. Hawn wants to know how much he gets, and Pope & Talbot wants to know how much, if anything, it must pay. The admiralty authorities do not answer that question.

It is not surprising, therefore, that Hawn is finally driven to asking this Court to formulate a rule. What is surprising is that he professes to support the rule below on grounds of "enlarged principles of justice and equity"

(p. 62). It is significant that he makes no attempt to demonstrate that the result below is either just or equitable. At the same time, his refraining from doing so is understandable, for the decision below defies support on either ground.

Respectfully submitted,

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